IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.PADMANABHAN NAIR

MONDAY, THE 2ND JULY 2007 / 11TH ASHADHA 1929

CMA.No. 274 of 2001()

OS.12/1989 of ADDL.MUNSIFF COURT,NEDUMANGAD
AS.82/1998 of SUB COURT, NEDUMANGAD
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APPELLANTS - RESPONDEWNTS -DEFENDANTS :
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1. PAHARUDHEEN HUSSAIN, AGED 57 YEARS, HALEEL MANZIL, N.M.C. XV-196, THEKKUMKARA MURI, NEDUMANGAD VILLAGE, ALI STORES, POZHAKUTTY, NEDUMANGAD.

2. RAMLA BEEVI WIFE OF HUSSAIN, AGED 47, HALEEL MANZIL, N.M.C. XV-696, THEKKUMKARA MURI, NEDUMANGAD VILLAGE, ALI STORES PAZHAKUTTY NEDUMANGAD.

BY ADV. SRI.M.K.CHETTIAR
SRI.K.MOHAN

RESPONDENTS - APPELLANT & RESPONDENTS:
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1. SASIDHARAN NAIR, S/O. GOPALA PILLAI, LEKSHMI VILASATHU VEEDU, ELIYAVOOR MURI, UZHAMALAKKAL VILLAGE.

2. KASIM BEEVI ASMA BEEVI, SABEENA COTTAGE, MANCHA THEKKUMKARA MURI, NEDUMANGAD.

3. MOHAMMED YOOSUPH OF DO. DO. (DIED)

4. BABU RAJENDRAN NAIR, SON OF GOAPALAPILLAI SHAJI BHAVAN FROM LEKSHMI VILASATHU VEEDU, ELIYAVOOR MURI, UZHAMALAKKAL VILLGE.

BY ADV. SRI.R.S.KALKURA

THIS CIVIL MISC. APPEAL HAVING BEEN FINALLY HEARD ON 02/07/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. PADMANABHAN NAIR, J.

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C.M.A. NO. 274 OF 2001

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Dated this the 2nd day of July, 2007

J U D G M E N T

Defendants 1 and 2 in O.S. No.12 of 1989 on the file of the Munsiff's Court, Nedumangad are the appellants. This appeal is filed against the judgment passed by the Sub Court, Nedumangad in A.S.No.82 of 1998 by which it set aside the decree and judgment passed by the trial court dismissing the suit filed by the plaintiff and remanded the same for fresh disposal.

2. Plaintiff filed the suit for redemption of property having an area of 16.5 cents comprised in R.S. No.1677/2. Plaint schedule property along with other properties belonged to the father of the plaintiff-first respondent. Suit property is a part of a larger extent of an area having an extent of 96 cents. Original owner of the property executed Exhibit A1 mortgage for 5 cents of property in favour of one Narayani Amma Karthiayani Amma. It was averred that after the death of plaintiff's father, plaintiff and his brother one Shri

Ramachandran Nair executed a mortgage deed in respect of 11.5 cents of property in favour of Smt. Karithiayani Amma. It was averred that after the execution of the second mortgage, members of the mortgagors family entered into a partition in which 40 cents of 96 cents were allotted to the share of the plaintiff, 31 cents were allotted to another person by name Ramachandran Nair and 25 cents were allotted to the additional 5th defendant. It was further averred that the plaintiff executed a superior mortgage in respect of the said property in favour of the third defendant and defendants are in possession of the properties as mortgagees.

3. Suit was one for redemption. The main contention raised by the contesting defendant was that 31 cents of land was allotted to the 5th defendant in the suit and he sold the property to the 3rd defendant. It was also contended that the property now sought to be redeemed is not the property allotted to the plaintiff and included in 40 cents which forms part of 25 cents allotted to Babu Rajendran. Other contentions were also raised.

4. A Commissioner was deputed, who filed Exhibit C2 report and C2(a) plan. Before the trial court appellants raised a contention that identification of the properties by the

Commissioner was not correct and no reliance can be placed on the report and plan. It was also contended that the properties identified as the mortgage holding is not correct and it was not possible to demarcate the suit property without identifying the 96 cents of property originally belonged to Gopala Pillai. Trial court considered the contentions and dismissed the suit. Challenging the decree and judgment passed by the trial court, plaintiff filed A.S. No.82 of 1998. Lower appellate court appreciated the evidence and found that the identification of the property by the Commissioner was not correct. It was also held that the Commissioner did not locate 96 cents and the plots allotted to the plaintiff and other sharers. It was further held that Exhibit C2 report and C2(a) plan cannot be accepted and the Commissioner failed to identify and locate the suit property correctly. Considering all aspects of the matter, lower appellate court thought it fit to give one more opportunity to the plaintiff to get the property identified and accordingly the decree and judgment passed by the trial court were set aside. Challenging that judgment of the lower appellate court, this appeal is filed.

5. Suit was for redemption of mortgage. Exhibits A1

and A2 are the mortgage deeds sought to be redeemed. Exhibit B24 produced by the appellants shows that the original mortgagee assigned right in favour of the third defendant. Exhibit B1 produced by the appellants shows that after the mortgages there was a partition in the family of mortgagors by which properties were allotted to different sharers. So the crucial question arising for consideration in this appeal is whether the plaintiff had proved his rights to redeem the property scheduled in the plaint. Since there was a dispute regarding the identity of the property, plaintiff applied for a commission and a Commissioner was deputed. The Commissioner filed Exhibits C2 and C2(a) report and plan. If the report and plan were not correct, the learned Munsiff ought to have set aside the same and either remitted the same to the same Commissioner or appointed a fresh Commissioner. The trial court accepted Exhibits C2 and C2(a). Lower appellate court held that Exhibits C2 and C2(a) are mpt correct and took a view that it was a fit case in which plaintiff shall be given an opportunity to prove the identity of the property. Lower appellate court did not make any observation regarding the merits of the contention, but only granted an opportunity to the plaintiff. The order of remand was not with

intention to help the plaintiff in order to fill up any lacuna. So the judgment passed by the lower appellate court is perfectly correct. I do not find any reason to interfere with the same. The appeal is without any merit and the same is only to be dismissed.

6. In the result, the appeal is dismissed.

Civil Miscellaneous Petition No.4808 of 2001 will stand dismissed.

K. PADMANABHAN NAIR, JUDGE.

vsv

K. PADMANABHAN NAIR, J.

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C.M.A. NO. 274 OF 2001

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J U D G M E N T

2nd JULY, 2007